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No. 03-1458

In the

Supreme Court of the United States

ROBERT PETIT, et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. The Fourteenth Amendment prohibits states from discriminating between individuals by race. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court held that a public university had a compelling educational interest in cultivating a racially diverse student body, and that the Court should defer to its academic freedom to create such a student body. Does *Grutter* also permit the city of Chicago to discriminate on the basis of race when promoting police officers?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of the petition for a writ of certiorari. Consent for the filing of this brief has been granted by counsel for all parties, and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation, organized under the laws of the State of California, for the purposes of engaging in litigation in matters affecting the public interest. For thirty years, PLF has litigated, and participated as amicus curiae, in both state and federal courts in numerous cases involving racial discrimination by the government, including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Gratz v. Bollinger*, 539 U.S. 244 (2003). PLF considers this case to be of special significance in that it concerns the government's authority to discriminate between individuals on the basis of race.

SUMMARY OF ARGUMENT

The petition should be granted for at least three reasons.

First, the decision below conflicts with the decisions of at least two other circuit courts, which have held that police departments may not discriminate on the basis of race in order to better conform to the racial prejudices of members of the community. *See Police Ass'n of New Orleans Through Cannatella v. New Orleans*, 100 F.3d 1159 (5th Cir. 1996);

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993).

Second, the decision below misapplies this Court's precedent on the issue of racial preferences. Those decisions have charted a relatively consistent course for half a century: government's power to discriminate on the basis of race is highly suspect, and is constitutional only in the most rare circumstances. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court upheld the University of Michigan's use of racial preferences in its admissions policies, after deferring to university officials' opinion that such preferences suited the school's educational mission.

The court below, however, held that *Grutter* also justified the City of Chicago's use of racial preferences in promoting police officers. The court held that the Chicago Police Department had a compelling interest in preferring minority members because civilians who are members of minority groups tend not to trust or cooperate with white police officers. "It seems to us," the court concluded, "that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago." *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003).

This conclusion is not warranted by *Grutter*. That decision allowed racial preferences only in the context of the University's educational mission. Specifically, it deferred to the University's academic freedom to create a racially diverse educational atmosphere. It did not hold that government agencies may discriminate on a racial basis simply to conform to the racial prejudices of the surrounding community. In fact, this Court has repeatedly held that such conformity cannot justify unconstitutional discrimination, regardless of the supposed benefits to be derived from it.

Finally, the court of appeals' misconstruction of *Grutter* reveals the ambiguity of that decision, which only this Court can resolve. In the short time since it was announced, courts and commentators have emphasized that its holding might become a warrant for limitless state power to discriminate on the basis of race. If that is not to happen, this Court must grant certiorari to limit or to clarify *Grutter*.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

This Court has never held that a police department may discriminate on the basis of race to better comport with the racial prejudices of members of the community. Indeed, the Court has held that a "City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

The court below, however, held that the Chicago Police Department could discriminate between police officers on the basis of race, because "[i]t seems to us that there is . . . [a] compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago." *Petit v. City of Chicago*, 352 F.3d at 1114. Citing *Grutter*, the court held that ensuring a racially diverse police department was as compelling an interest as ensuring a racially diverse student body at a university. Since the Chicago Police Department must deal with members of ethnic groups who might be unwilling to trust or deal with white police officers, the court held that the Police Department was justified in granting preferences to nonwhite

officers in order to encourage community trust and cooperation. *Id.*

Whether, and to what degree, a government agency may accede to community prejudices is an issue which the circuit courts of appeals have decided in different ways. The opinion below conflicts with decisions of the Fifth and Fourth Circuits, and possibly the Sixth Circuit as well. The Seventh Circuit, on the other hand, has held that in the context of prison discipline and community policing, such a justification is acceptable, and the Fourth Circuit has not overruled a decision permitting a race-based police promotion on the same rationale adopted by the court below. This confusion among the circuits can only be resolved by this Court.

In *Police Ass'n of New Orleans Through Cannatella v. New Orleans*, 100 F.3d 1159, the Fifth Circuit Court of Appeals struck down a police department's race-based promotion scheme. According to the police department, the scheme was intended "to give a better reflection of the racial composition of the city; 'more African-American supervisors could better supervise African-American officers who in turn were needed to relate to the larger African-American population.' " *Id.* at 1168 (citation omitted). The court, however, flatly rejected that: only "remedy[ing] past specific instances of discrimination" could justify racial preferences. *Id.*

Likewise, in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993), the Fourth Circuit struck down a police department policy of giving promotions to officers on the basis of their race. This policy was based on the city's belief that a higher percentage of minority officers would increase the "cooperation and support from the citizens . . . . According to the City, effective law enforcement can only be accomplished . . . with a racially diverse police force, and the only way to achieve racial diversity is to promote officers on the basis of their race." *Id.* at 213. The court held that there was no

evidence to demonstrate that police departments actually increased their effectiveness through racial preferences, and expressed strong skepticism as to whether increased effectiveness would constitute a legitimate state interest: "we fear others could use this same rationale for a much less benign purpose. Such a result would promote racial polarization and the stereotypical view that only members of the same race can police themselves." *Id.* at 214.[2]

In *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990), the Sixth Circuit held that a police department's race preference program violated the Fourteenth Amendment. The police department argued that the program was justified as a remedy for the department's past discrimination in hiring. The court found insufficient evidence to substantiate this argument. *See id.* at 1198. But the police department also provided evidence of prior racially-charged confrontations between police officers and members of the public. The court concluded that these "confrontations between minorities and nonminorities" did not prove past discrimination by the department, or that minority police officers were "underutilized"; instead they only revealed the racial pressures in the community at large. *Id.* at 1202. Bending to such racial pressures, however, was not a compelling government interest. *Id.* Racial confrontations in the community, the court held, "are the classical sociological factors identified by the Supreme Court when it concluded, as it did, that '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)). The Eleventh Circuit has also rejected an

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[2] In *Hayes*, the Fourth Circuit seemed to disclaim its earlier holding in *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), on the ground that *Talbert* "did not determine that the interest [in racial diversity] was sufficiently 'compelling' to justify racial classifications under the strict scrutiny standard . . . ." 10 F.3d at 213.

"effectiveness in a prejudiced society" rationale for racial discrimination, albeit not in the police context. *See Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 475 (11th Cir. 1999).

In addition to the promotion preferences at issue in this case, the Seventh Circuit has concluded that a single instance of a racial preference was a constitutional way to preserve prison discipline. In *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997), the court of appeals held that inmates in a prison modeled after a military boot camp were unlikely to follow the orders of a primarily white prison guard staff. *See id.* at 920. The court therefore permitted the race-based promotion of a single guard to the position of lieutenant, although it emphasized the narrowness of its decision:

> [W]e do not hold . . . that [the state] would have been entitled to take steps to make the racial composition of the security staff mirror that of the inmate population. That would have gone beyond the limits of demonstrable need. Nor do we hold or believe that prison authorities are entitled to yield to extortionate demands from prisoners for guards of their own race . . . . We also do not hold that race is (or is not) a proper factor to take into account in staffing an ordinary prison . . . . We hold only that on the record compiled in the district court, the preference that the administration . . . gave a black male applicant for a lieutenant's job on the ground of his race was not unconstitutional.

Id. at 920-21. The decision below did not cite *Wittmer*, or explain how its decision fit within *Wittmer*'s limitations.

In *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), the Fourth Circuit Court of Appeals upheld the use of race preferences in police promotions in order to "communicate better" with minority

members of the public, "cater to the public's desires," and to aid "crime prevention and solution" by encouraging "public respect and confidence in the police." *Id.* at 931. *See also Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002) (allowing police department to engage in race preferences out of efficiency concerns despite acknowledging that "allow[ing] discrimination on the basis that it was efficient or expedient would cause inroads into equal protection that the courts are unwilling to countenance").

Such division among, and even within, the circuits militates for the granting of this petition, especially after this Court's decision in *Grutter*. Lower courts need guidance as to whether the "diversity" rationale permits government agencies to discriminate on the basis of race in all of their operations, or whether that rationale extends only to educational institutions.

II

THE DECISION BELOW MISCONSTRUED THIS COURT'S DECISION IN *GRUTTER*

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), this Court held that all instances of government discriminating between people on the basis of race is subject to strict judicial scrutiny. *Id.* at 227. The Court explained that this was necessary because state racial discrimination of any sort is inherently suspect, since racial characteristics are almost never an appropriate consideration for the government. *See id.* at 216 ("the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' and subject to the 'most rigid scrutiny'; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose." (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Since the purpose of the

Fourteenth Amendment is to make good on the Declaration of Independence's principle that "all men are created equal," 1 Stat. 1 (1776), government discrimination on the basis of race must be regarded with the gravest suspicion.

Under strict scrutiny, the Court has identified two situations in which racial discrimination by the government was acceptable: imminent threats to public safety such as during war, *Korematsu, supra,* or remedying specific, documented past instances of racial discrimination by the government. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989). Otherwise, the Court has held that government had an affirmative duty to eliminate racial classifications.

Recently, this Court found a third situation to justify government racial discrimination. In *Grutter*, the Court deferred to the determination of public university officials that racial preferences were an acceptable method by which the government might ensure "a mix of students with varying backgrounds and experiences who will respect and learn from each other." 539 U.S. at 314. The court below held that "[u]nder the *Grutter* standards . . . the City of Chicago has set out a compelling operational need for a diverse police department." *Petit*, 352 F.3d at 1114. But *Grutter* does not apply here.

First, the context of that case reveals that the Court intended its holding to be limited to educational institutions. The decision repeatedly asserted the important "educational benefits" that University officials believed would be served by a racially diverse student body. *See Grutter*, 539 U.S. at 328. The Court underlined its "tradition of giving a degree of deference to a university's academic decisions," *id.*, and the relevance of "the Law School's proper institutional mission . . . ." *Id.* at 329; *see also Wygant*, 476 U.S. at 286 (opinion of O'Connor, J.) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at

least in the context of higher education, to support the use of racial considerations in furthering that interest."). *Grutter* permitted race and ethnic preferences in the context of a state law school in which school administrators believed a "critical mass" of minority students would protect them from feeling isolated, and would encourage them to participate, which in turn would lead to a more robust exchange of ideas in the classroom. *Id.* at 326-33.

Second, the educational-benefits rationale cannot apply in the context of police promotions. This Court made clear that the concept of critical mass did not depend on any set percentage of representation and was entirely distinct from the concept of racial balancing which is "patently unconstitutional." *Id.* at 330. The City of Chicago, however, has established a system of promoting police officers by "standardizing" examination scores to equalize the scores of certain minorities with other groups. This is nothing more than an effort in unconstitutional racial balancing.

Third, *Grutter* found that the University of Michigan's academic freedom, "grounded in the First Amendment," entitled it to a degree of autonomy from judicial interference. *Id.* at 329. The Court therefore deferred to the University's judgment in how to best educate and prepare its students, including using racial preferences in admissions. But police departments do not have such autonomy. They possess nothing akin to "academic freedom" which would entitle them to judicial deference, or any First Amendment right to a robust exchange of ideas. There are no educational benefits to be derived from the City's race preferences, and none of the considerations of "expansive freedoms of speech and thought" which the *Grutter* Court found so compelling. *See id.* Instead, the Police Department's rationale for race preferences is simply racial balancing—to achieve a particular representation of races without consideration of any factors other than race and without proof that the action is based on any identified past

discrimination by the government—to appease prejudiced members of the community.

Most importantly, however, *Grutter* contrasted the compelling government interest in purported educational benefits of "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.* at 330, with "simply 'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin' . . . which is patently unconstitutional." *Id.* at 329-30 (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)) The Police Department's asserted interest in relating to the community falls within the latter category.

The court of appeals held that the Police Department could use racial preferences to assuage "[d]istrust and a lack of confidence in the police" by minority groups in Chicago. *Petit*, 352 F.3d at 1115. In other words, the Department could discriminate in order to better conform to the prejudices of the community at large. This Court has certainly never permitted government discrimination for this purpose.

If "bowing to community prejudices" were a legitimate state interest, the Court would never have struck down the anti-miscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967), would not have allowed civil rights demonstrators to march in the streets of southern cities, *see Cox v. Louisiana*, 379 U.S. 536 (1965), or lent its aid to the integration of the University of Mississippi. *Meredith v. Fair*, 83 S. Ct. 10 (1962) (Black, Circuit Justice).

Indeed, if assuaging the racial prejudices of the community were a legitimate state interest, this Court would never have ordered desegregation. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958)

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is . . . this aim cannot be

> accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.

(Quoting *Buchanan v. Warley*, 245 U.S. 60 (1917)). *See also Wygant*, 476 U.S. at 276 (plurality opinion) ("Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Bd. of Educ. . . . .*"); *James v. Bd. of Educ. of the Central Dist. No. 1 of Towns of Addison, et al.*, 461 F.2d 566, 575 (2d Cir. 1972) ("Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail."). In fact, the policy concerns at the heart of *Grutter*—namely, fostering a society where people learn to shed their prejudices and move toward true racial equality—actually clash with the Chicago Police Department's race preferences: these preferences do not teach the public to abandon their distrust of other races, but actually reward public prejudice.

The Police Department's asserted interest in efficient policing of the community differs widely from the educational interest in "diversity" which the Court found in *Grutter*, and reaches farther than this Court's decisions have ever warranted. Indeed, if conforming to community prejudice is a legitimate state interest, it is difficult to imagine what rationale would *not* justify racial discrimination. Unfortunately, the Seventh Circuit Court of Appeals is not the only court to apply *Grutter* broadly. In *Berkley v. United States*, 59 Fed. Cl. 675, 683 (2004), the Court of Federal Claims even suggested that *Grutter* would permit deference to racial discrimination by the military. This is extremely disturbing, considering that one of the major milestones of racial equality in this nation's history was the ending of racial discrimination by the military. *See Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris,

J., concurring) ("Today, it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions.").

These facts demonstrate the lower courts' serious need for guidance on the limits of *Grutter*'s rationale. In dissenting from the denial of certiorari in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 124 S. Ct. 556 (2003), Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, stated that he believed certiorari was warranted because the decision below had left standing a government decision to use race preferences in public contracting which rested on weak evidence of past discrimination. Lower courts therefore needed guidance as to whether *Grutter* had effectively overruled the *Croson* decision. *Id.* at 560. But this case militates even more strongly for this Court's review. While *Concrete Works* invoked the uncontroversial presumption that remedying past discrimination is a compelling government interest, this case significantly expands the range of "compelling interests" to be served by racial preferences. Rather than just remedying past discrimination, or preventing imminent public harm, or fostering an educational environment which will break down racial stereotypes, the court of appeals held that government may discriminate so as to better appease the prejudices of the community. The Court should grant review to clarify that *Grutter* does not warrant such an expansive role for racial discrimination, but that it is limited only to the context of educational institutions.

III

IF THE DECISION BELOW STANDS, *GRUTTER*'S RATIONALE WILL GROW INTO A LIMITLESS EXCEPTION TO THE EQUAL PROTECTION CLAUSE

In *Berkley, supra,* the Court of Federal Claims noted that "[a]lthough the education admissions process was the factual predicate in *Grutter*, strict scrutiny cases decided in the context of education have historically been analogized to other governmental actions." 59 Fed. Cl. at 683. This is precisely why this Court should grant review here.

In fact, *Grutter*'s educational context sharply distinguishes it from this case. The *Grutter* Court repeatedly emphasized the importance of the University's academic freedom to pursue its educational mission with little judicial interference, as protected by the First Amendment. *See, e.g.*, 539 U.S. at 306-07, 323-24, 328-29. But police departments, and government hiring policies generally, deserve no such deference. The principle of academic freedom is supported by such values as the freedom to explore new and unique viewpoints, and the encouragement of a "'wide exposure to [a] robust exchange of ideas.'" *Bakke*, 438 U.S. at 312 (plurality opinion) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967)). These values are not applicable to a police department, the primary concern of which is preserving the health, safety, and welfare of the state, within the bounds of the Constitution.

Even if police departments are analogous to schools, however, the decision below is not warranted by this Court's decisions with regard to racial discrimination in schools. The rationale adopted by the court of appeals is essentially the same as the "role model" theory which this Court has already rejected in cases involving the hiring of public school teachers. *See Croson*, 488 U.S. at 497-98 (plurality opinion); *Wygant*, 476

U.S. at 274-76 (plurality opinion). The "role model" theory holds that "some black teachers might share a cultural heritage with black students that no white teacher does," and that there are "relevant differences between black and white teachers that make black teachers in some respects uniquely qualified to teach . . . ." Laurence H. Tribe, *American Constitutional Law* 1535 (2d ed. 1988). Likewise, the decision below holds that minority police officers are uniquely qualified on the basis of their race and "shared cultural heritage." *See further* Kirk O. Kolbo, *Leaving* Bakke, 51 Drake L. Rev. 715, 718-21 (2003) (explaining that *Grutter*'s "diversity rationale" is indistinguishable from "role model" rationale).

The "role model" theory is a "weak argument[ ] for discrimination . . . because of lack of substantiation and a well-nigh unlimited reach." *Wittmer*, 87 F.3d at 919-20. Like the "role model" theory, the decision below is unrelated to evidence of past government discrimination, and "allows the [city] to engage in discriminatory . . . practices long past the point required by any legitimate remedial purpose." *Wygant*, 476 U.S. at 275. The city's discriminatory program is ageless in its reach into the past, and timeless in its ability to affect the future. *See id.* at 276. Worse, the decision below, like the "role model" theory, "could be used to escape the obligation to remedy [discriminatory] practices . . . ." *Id.* If achieving "diversity" is an acceptable justification for racial discrimination by the government in contexts beyond the educational arena, where special concern for First Amendment protections of academic freedom were held to require judicial deference, it is difficult to imagine a principled stopping point for racial discrimination by government.

In any event, the decision below holds that the state may discriminate on the basis of race so as to serve the community's prejudices, and thereby increase the administrative effectiveness. This conclusion is inconsistent with decades of Supreme Court precedent, and stretches *Grutter* beyond its

proper context. More importantly, it threatens to undermine the purposes of the Equal Protection Clause.

If minority police officers must receive preferences because the community is prejudiced against white police officers, why would cities whose populations are prejudiced against black or Hispanic people not be allowed to discriminate against black or Hispanic police officers? The decision below holds that the police department may give special treatment to members of minority groups because some minority members of the community distrust white police officers due to bad experiences with white officers in the past. If this principle is allowed to stand, there is no reason a white neighborhood's residents could not demand to be served by only white officers because of their prejudices against minority police officers. If racial discrimination is permitted to one group, or in one case, simply to appease the public's prejudices, then racial discrimination will spread throughout society. *See Wygant*, 476 U.S. at 276 (warning that government race discrimination to appease social prejudices "could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students."); *cf.* Abraham Lincoln, *Fragment on Slavery* (1854) *in* 1 *Lincoln: Speeches And Writings* 303 (Library of America 1989) ("If A. can prove, however conclusively, that he may [discriminate against] B.—why may not B. snatch the same argument, and prove equally, that he may [discriminate against] A.?").

In *Wygant*, this Court declared that it "never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." 476 U.S. at 274. After *Grutter*, the continuing validity of the *Wygant* decision is open to question. The Court should take this opportunity to clarify

whether *Wygant*'s insistence remains valid law, or whether the rationale of *Grutter* extends beyond the educational context.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

DATED: May, 2004.

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